United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1432

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-1432

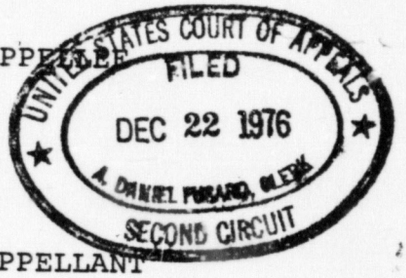
UNITED STATES OF AMERICA

PLAINTIFF-APPELLEE

V.

DAVID R. LEWIS ET AL

DEFENDANT-APPELLANT



BRIEF OF DEFENDANT-APPELLANT DAVID R. LEWIS

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18 U.S.C. 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. 2113 (a)

Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny -

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

18 U.S.C. 2113 (b)

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. 2113 (d)

Whoever, in committing or in attempting to commit, any offense defined in susections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty five years or both.

18 U.S.C. 2 (a)

Whoever commits an offense against the United States or aides, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

QUESTIONS PRESENTED

1. Whether a case which relies on the uncorroberated testimony of an alleged co-conspirator should be reversed when the Government illicits before the jury, inadmissible evidence of a subsequent bank robbery and the fact Lewis is presently in prison?

2. Did the trial Judge err in permitting the Government to introduce the facts of an earlier bank robbery to prove the identity of Lewis and therefore violated Rule 404(b) Federal Rules of Evidence?

3. Whether the indictment should have been dismissed because of the preindictment delay by the Government and the advantage it gained thereby?

STATEMENT OF THE CASE

A Federal Grand Jury at New Haven returned a four count indictment on January 5, 1976 charging Aaron Stewart, David Williams, David Lewis, Richard Washington and Arthur Hendrix with violation of 18 United States Code, Sections, 18:2113 (a) 2(a); 18:2113 (b) 2(a); 18:2113 (d) 2(a); and 18:371.

A jury was selected on May 24, 1976 in Waterbury, Senior Judge Thomas F. Murphy, presiding.

On June 2, 1976 the trial of David Lewis, David Williams and Richard Washington started in Waterbury. Prior to the commencement of the Government's case, the case against Aaron Stewart was dismissed by the Government on the basis that some misleading evidence had been presented to the Grand Jury.

On Saturday June 5, 1976 a mistrial was declared by Judge Murphy after the jury reported itself deadlocked. On August 2, 1976 in Hartford the retrial of David Lewis, David Williams, and Richard Washington commenced before the Honorable Jon O. Newman, presiding.

On Friday, August 6, 1976 the jury convicted all three defendants of the three counts submitted to it, the court having dismissed count 4, the conspiracy count.

On September 17, 1976, Judge Newman sentenced David Lewis to twelve years imprisonment on all counts, to run concurrently from September 17, 1976 with the seven year sentence Lewis was then serving for a prior bank robbery conviction.

STATEMENT OF FACTS

On September 20, 1973 at 9:15 the Westside Office of the Connecticut National Bank was held up at gunpoint by three or four persons, wearing ski masks, coveralls and gloves. Arthur Hendrix, an admitted heroin pusher and bank robber, testified he robbed the bank with Aaron Stewart, David Lewis, David Williams, Richard Washington and Joe Daniels (Tr. p. 30 & 34).

Hendrix testified that on September 19, he met with David Williams, David Lewis and Joe Daniels in the afternoon (Tr. p. 39).

At the first meeting it was discussed that a job was planned to make some money (Tr. p. 40). Coveralls, masks and gloves would be needed in addition to weapons (Tr. p. 41).

At the second meeting which took place at night, Hendrix testified he was instructed by David Williams and Joe Daniels to steal a car. He was told if anyone gave him trouble to stuff them in the trunk (Tr. p. 41-42). Hendrix could not find a car to steal so he took his step-brother's car, Charles Spruill, to which he had the keys (Tr. p. 45). The morning of the robbery Hendrix testified Joe Daniels, Richard Washington, David Lewis, David Williams, Aaron Stewart and himself drove to Connecticut, in caravan fashion (Tr. p. 46). David Williams drove an Oldsmobile Cutlass, Joe Daniels the stolen Buick Skylark, T. C. Washington

a black Lincoln, David Lewis a '72 Buick Electra and Hendrix a '73 Buick Electra (Tr. p. 47). Hendrix went on, that they all parked at a lot off the Connecticut Trunpike (Tr. p. 48). Hendrix claims it was at the lot that he first learned that a bank robbery was what they were about to commit (Tr. p. 119).

Hendrix then testified that they drove to the bank, David Lewis went in the back door with Aaron Stewart and he went in the front door with David Williams, Richard Washington was the driver of the getaway car (Tr. p. 51 & 121) and Joe Daniels stayed at the lot where their cars were parked. Hendrix stated David Lewis held a sawed off shot gun on the customers and tellers while he (Hendrix) scooped up the money along with David Williams. (Tr. p. 53) When they left the bank and entered the parking lot Richard Washington was not there with the getaway car but did arrive and they all made their escape. Hendrix testified that he drove back to New York (Tr. p. 59). Hendrix went directly to the unemployment office to sign for a check. This fact was corroborated by Ex. 11, his unemployment record. Later that day it is Hendrix's testimony that he met at Joe Daniels house to split up the money, Joe Daniels, David Williams, David Lewis and Aaron Stewart were there.

Julian Jefferson, a man with a criminal record going back twenty years was permitted to testify in the Government's case in chief about a bank robbery that he had committed on August 31, 1973 with David Lewis, David Williams, Richard Washington, Moses Scarborough and Joe Daniels.

It was Jefferson's testimony that at the time they were splitting up the proceeds of the August 31, 1973 robbery David Williams said the next target was a bank in Stamford, Connecticut to which David Lewis said it would be "a sweet thing". (Tr. p. 189)

Jefferson's testimony, at the first trial, was ruled too dangerous, remote as to count 4 and questionable as to whether there was a common plan to rob banks by Judge Murphy. Judge Murphy did not allow Jefferson to testify until after David Lewis and David Williams had testified. (Exhibit A p. 138, 139, & 148)

Jefferson went on to testify that he held the sawed off rifle during the August 31, 1973 bank job while David Lewis scooped up the money (Tr. p. 178-180, 204). It was also brought out through Jefferson at the second trial, that he was right handed and David Lewis was left handed; that David Lewis stuttered, however, he, David Lewis, could communicate clearly (Tr. p. 190-192). One of the bank photographs taken by the security camera during the robbery depicted the robber holding the sawed off gun in his left hand. However, another photograph showed the same robber holding the sawed off gun, pulling a ski mask down with his right hand to cover his face.

Mrs. Buchetto, a teller was asked to describe the robber holding the sawed off gun. He was 5'10" or 5'11" about 180 pounds and

25 years old. Mrs. Buchetto got a look at the robber's face before he pulled the mask down. (Tr. p. 267-268).

Julian Jefferson was asked how tall he was to which he replied five foot ten" (Tr. p. 204).

Mrs. Perry and Mrs. Buchetto testified that the orders given by the robber holding the sawed off gun, were given in a loud and clear voice (Tr. p. 254).

It was brought out by Dr. Quist a speech pathologist (Tr. p. 29) that David Lewis did in fact stutter and that he was treating him. This was done by the Government during its case in chief in anticipation of David Lewis' defense which was developed at the first trial. Dr. Quist further testified that a stutterer could sometimes speak clearly during a stressful situation. During the Doctor's testimony he referred to David Lewis and the fact that he had worked with him in the prison (Tr. p. 280). This was immediately objected to, David Lewis did not take the witness stand during the second trial as he had done at the first trial.

Germaine Lewis, the step-daughter of David Lewis testified that her father stuttered and spoke in a low voice (Tr. p. 454). The jury was able to view the size of David Lewis close up. During closing argument David Lewis was asked by counsel to stand up and come close to the jury, which he did do. David Lewis is about 5'6" tall and thin (Tr. p. 595).

David Williams took the stand in his defense and the jury heard his criminal record which included 7 bank robberies 6 or 7 supermarket robberies (Tr. p. 391) and other criminal conduct. (Tr. p. 342)

It was brought out that he had testified for the Government on two previous occasions. William's wife, who acknowledged she had robbed a bank with her husband, supplied an alibi. Richard Washington did not take the stand and relied on an alibi defense.

Lewis tried to show that the robber holding the shot gun could not have been him. Lewis relied on the facts that the height and weight of the robber he was supposed to be were entirely different. Also, Lewis did have difficulty speaking and the orders give during the robbery were given in a loud, clear and rough voice.

I. WHEN THE GOVERNMENT'S CASE RELIES SOLEY ON THE TESTIMONY OF AN ALLEGED ACCOMPLICE AND CERTAIN PREJUDICIAL MATTERS COME BEFORE THE JURY AS A RESULT OF THE GOVERNMENT'S CONDUCT OF THE TRIAL, THE CONVICTION SHOULD BE REVERSED.

The Government's case rested primarily on accomplice testimony. When Judge Newman decided not to submit the conspiracy count to the jury he recognized that the Government's case rested on Hendrix's testimony. In fact the court stated:

> " I appreciate there is some other evidence in the case, but as far as these three people being at the bank that day, the only evidence that says so comes from Hendrix . . . " (Tr. p. 557)

During the trial Lewis can point to two distinct prejudicial occurrences that could have tipped an otherwise close case, in the Government's favor.

A. On the Government's redirect of Hendrix (the alleged accomplice) the Assistant United States Attorney attempted to bring out the participation by Lewis in a bank robbery which occurred subsequent to the September 20, 1973 robbery he was being tried for. A mistrial was moved for and denied (Tr. p. 155). This occurred subsequent to a discussion, by the court and counsel out of the hearing of the jury, of other bank robbery testimony the Government sought to have admitted. When this happened the court in fact expressed surprise about the whole episode. (Tr. P. 154). When the Assistant United States Attorney tried to justify his conduct on the basis that he wanted to show Hendrix's ability to remember, the

court responded to this argument as follows:

> "That may be, but you can't offer as evidence of his credibility his ability to remember details of another robbery that just coincidentally happens to allegedly involve the co-defendants..." (Tr. p. 158).

Counsel elected not to have an instruction to the jury as an instruction would only highlight the testimony.

> The Court ... if there is a request for an instuction I'll consider that although obviously that may highlight so I can understand if counsel prefers to let the matter just not be referred to (Tr. p. 160)

B. Dr. Quist was called by the Government in its case in chief. Quist is a speech pathologist who had been treating Lewis in prison. This was done in anticipation of Lewis' defense, which was developed at the first trial, that the robber who gave the orders spoke in a loud and clear voice when in fact Lewis stuttered. While testifying on direct examination Quist stated "I have worked with him in a very limited situation in the prison." (Tr. p. 280). A motion for mistrial was made and denied.

The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. Drope v. Missouri 420 U.S. 162 (1975). The presumption of innocence is a basic component of a fair trial under our system of criminal justice. Coffin v. U.S. 156 U.S. 432 (1895).

Lewis did not want the jury to hear of his current imprisonment. The impact of Quist's remark cannot be determined. However, in a close case such a remark heard by the jury could have influenced the jury.

This was not a case in which the defense tactic was to elicit sympathy from the jury by having the defendant dressed in prison garb. Anderson V. Watt 475 F 2d 881 (C.A.10 1972)

This was not a case where the defendant wanted the jury to know he was imprisoned for another crime.

The defense was plain and simple, that Lewis did not rob the bank.

Therefore, any evidence that tended to undermine the factfinding process the court should have been alert to. Estelle V. Williams 96 S. Ct. 1691 (1976).

However, it is conceded it would be unfair to criticize the court, the fault lies clearly with the Government. Dr. Quist was a proper rebuttal witness. Had the Government waited until the defense developed, this incident might not have happened.

The Government was overly zealous in this second trial. The Hendrix & Quist testimony was prejudicial to Lewis' cause and should be sufficient to reverse his conviction.

II. EVIDENCE OF AN EARLIER BANK ROBBERY ADMITTED BY THE COURT AS A SIMILAR ACT WAS ERRONEOUS AND VIOLATED RULE 404 (b) FEDERAL RULES OF EVIDENCE

The Court erred in admitting Julian Jefferson's testimony about alleged conversations that had taken place on August 31, 1973, and the facts of a bank robbery that occurred that day as a prior similar act. Jefferson testified that during a meeting after having robbed a bank on August 31, 1973, Williams stated the next target was a bank in Stamford, Connecticut to which David Lewis replied it would be "a sweet thing" (Tr. p. 189).

Judge Murphy at the first trial did not permit Jefferson's testimony in the Government's case in chief, he determined the testimony as being questionable as to whether it was a prior similar act, remote, and just too dangerous (Exhibit B p. 138, 139, 148).

Judge Newman, ruled to the contrary, at the second trial, although it was objected to (Tr. p. 132-144). As to Lewis the role he was supposed to have played was different in both robberies. During the August 31, 1973 bank robbery he allegedly scooped up the money while Jefferson held the sawed off rifle on the tellers and customers. During the September 20 bank robbery Lewis was supposed to have held the sawed off rifle on the tellers and customers.

Judge Newman in ruling the Jefferson testimony admissible stated "... and their roles are the same ..."(Tr. P. 139). This may have been true as to the Co-defendants Williams and Washington but not Lewis.

Jefferson testified he was holding the sawed off rifle in the August 31, 1973 robbery (Tr. p. 178-180) and Hendrix testified it

was Lewis holding the sawed off gun during the September 20, 1973 robbery (Tr. p. 53).

The prior similar act doctrine permits the introduction of evidence of similar acts, including other crimes when it is substantially relevant for a purpose other than merely to show defendant's criminal character or disposition. U.S.A. v. Deaton 381 F 2d 114 (1967).

The Government sought to introduce this evidence as a prior similar act on the issue of identity. The Court was in error as to Lewis as stated above.

In fact the Assistant United States Attorney stated in support of his argument as to the Hendrix redirect on the subsequent bank robbery testimony as follows:

> "Mr. Dow: Not necessarily, Mr. Byelas, the name of the players may be different but the game is the same (Tr. p. 158)."

The whole point of the evidence was to prove the identity of the robbers. When in fact the only issue in the case for the jury was the identity of the robbers, the admission of Jefferson's testimony was clearly erroneous and the prejudicial affect of it clearly out weighed its probative value.

It did not go to prove Lewis was the robber holding the sawed off rifle. It did in fact permit the jury to hear of Lewis' other criminal activity. These were two different robberies committed by different people and not part and parcel of the same transaction. Deaton at p. 118.

Under Rule 404 (b) Federal Rules of Evidence, evidence of other crimes is not admissible ... however, it may be admissible for other purposes, such as proof of ... identity.

It would appear that rule 404 (b) precludes admissibility of evidence such as the Jefferson testimony, unless it clearly falls into one of a limited number of exceptions. It is unmistakeably clear that the testimony did not establish the identity of Lewis.

The testimony established Lewis as a bank robber and nothing more.

Therefore, as to Lewis the Jefferson testimony did not come under one of the exceptions to Rule 404(b) and should have been excluded.

This court need not speculate on the impact of Jefferson's testimony on the jury. The jury wanted to hear it again during its deliberations. (Tr. p. 668)

III. IT WAS ERROR NOT TO DISMISS THE INDICTMENT AS TO DAVID LEWIS

The bank robbery Lewis was tried for occurred on September 20, 1973. Sometime in July 1974 Mr. Dow an Assistant United States Attorney presented evidence to a Grand Jury in Connecticut concerning the September 20, 1973 crime. On or about October 8, 1974 an indictment of David Lewis et al was voted on by a Grand Jury and signed by the Forman and the Assistant United States Attorney. However, the indictment was not returned in open court but placed in an envelope. On January 5, 1976 David Lewis was indicted for the crime which occurred on September 20, 1973 which indictment was identical to the earlier indictment. (See memo of Murphy, J. included herewith as Exhibit B)

A. It would appear that Rule 6(f) Federal Rules of Criminal Procedure and cases such as U.S. V. Cox 342 F2d 167 (1965) precludes any argument that the first indictment was a valid indictment. Therefore, any Sixth Amendment speedy trial argument is also precluded, since Lewis was not an accused and U.S. V. Marion 404 U.S. 307 (1971) would control.

B. However, as a result of the Government's conduct in this case, Lewis is being denied his liberty without due process of law in violation of his Fifth Amendment Rights. Lewis does not contend that he can point to an intentional delay to gain a tactical advantage by the Government, but does contend where the Government's conduct does in fact result in such an advantage and he has been

prejudiced his conviction should be reversed. U.S. V. Barket, 530 F2d 189 (8th Cir.) 1976.

Lewis contrary to the testimony of Hendrix, tried to show he was not the robber holding the shot gun. In addition to the difference in height and weight, Lewis tried to show he could not have been the robber giving the orders due to his stuttering. Through Germaine Lewis it was proved Lewis stuttered worse in 1973 then he did in August 1976 (Tr. P. 454). Even Dr. Quist conceded he (Lewis) stuttered more when he first started working with him (Tr. p. 281). Had Lewis been tried in 1974 his stuttering condition would have been so, that a jury might have been impressed more with this evidence.

The test for determining prejudicial impact is whether the delay "has impaired the defendant's ability to defend himself." U.S. V. Golden 436 F 2d 941 (8th Cir.) cert. denied, 404 U.S. 910 (1971).

In this case the Government gained an advantage by the preindictment delay and should not be rewarded.

CONCLUSION

In a case that relies on the testimony of an alleged co-conspirator, a conviction should be reversed when improper evidence comes before the jury.

The jury heard Lewis was in prison; the jury heard of a subsequent bank robbery and the jury heard the Jefferson testimony of an earlier robbery.

Taken together, the scales were improperly tipped in the Government's favor, and the conviction of David Lewis should be reversed, and the indictment dismissed. In the case of David Lewis no further prosecution would appear to be warranted due to the fact that he is presently incarcerated on bank robbery charges that he had pleaded guilty to. This instant case would add mothing to the deterrent effect of criminal prosecutions, or aid in the rehabilitation of Lewis.

Respectfully submitted,

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Attorney for Appellant Lewis

DATE: November 15, 1976

CERTIFICATE OF SERVICE

This is to certify that two copies of the Appellant's Brief were mailed to Peter Dorsey, Esq. United States Attorney, 270 Orange Street, Post Office Box 1824, New Haven, Connecticut and one copy of the Appellant's brief was mailed to Howard Eckenrode, Esq. 147 Broad Street, Milford, Connecticut, Kenneth Salaway, Esq. 125-10 Queens Boulevard, Kew Gardens, New York, and David Lewis #79656-158 P.O. Box 33, Terre Haute, Indiana 47808, this 15th day of November, 1976.

Leslie Byelas

LESLIE BYELAS

MR. ECKENRODE: No objection.

(Photograph of back of car received and marked Government Exhibit 5A.)

(Photograph of front of car received and marked Government Exhibit 5B.)

(Photograph of side of car and back received and marked Government Exhibit 5C.)

(Photograph of side of car received and marked Government Exhibit 5D.)

MR. DOW: (Hands photographs to jury.)

Excuse me just a minute, your Honor. I have nothing further, your Honor.

THE COURT: Any cross, gentlemen?

MR. BYELAS: No cross.

MR. ECKENRODE: No cross.

THE COURT: Thank you, sir.

MR. DOW: Your Honor, perhaps this might be a convenient time to take a break.

THE COURT: I'm sure you won't oppose that. We'll take a short recess now.

(Whereupon, court recessed at 2:20 p.m. and reconvened at 2:35 p.m.)

THE COURT: Mr. Dow.

MR. DOW: Yes, sir. Your Honor, I think it is advisable before the next witness takes the

stand -- that witness will be Julian Jefferson by the way -- to obtain a ru ng from the court. It is anticipated that Mr. Jefferson's testimony will be substantially as follows: he was involved in the bank robbery in Long Island on August 31, 1973. Participating with him in that bank robbery were three of the defendants here on trial, David Williams, David Lewis and T.C., Richard Washington. The role of Washington in that robbery was that of a getaway driver.

Additionally, Mr. Jefferson would testify that during the execution of the bank robbery, Mr. Washington similarly, as he did in this case, was not where he was supposed to be shortly after the robbery.

Additionally, David Williams went into the bank with a gun as did David Lewis. At the conclusion of that bank robbery the bank robbers met at an apartment on Francis Lewis Boulevard in Queens to divide the proceeds. Present at that meeting were Richard Washington, David Lewis, David Williams, I believe Joseph Daniels, and another individual named Mo Scarborough. Incidentally, Joseph Daniels was supposed to drive the second backup getaway car in the Long Island

robbery as he was supposed to do in this case as well.

THE COURT: What about the witness himself? Did he participate?

MR. DOW: Yes, sir. He participated in the bank robbery. He carried a gun, in fact. They were splitting up the proceeds. I don't know exactly what time. It was sometime after the robbery, obviously, at which time Williams and Daniels began a conversation to the effect that "We are taking five hundred dollars off the top from everyone's share because we have got a bank that we have cased up in Connecticut, in Stamford, Connecticut that looks like it's real sweet.", meaning at least in Jefferson's impression, that it was easy pickings, basically.

Additionally, David Williams mentioned that he wanted to use that money to buy a Cutlass with to use in the bank robbery.

THE COURT: Use that money, you mean part of that?

MR. DOW: The five hundred taken off the top from everybody's share to buy an Oldsmobile Cutlass with.

Now, that is the sum and substance of Mr.

Jefferson's testimony. Certainly, as to the conversation between the three people now on trial or which all three were present, I submit that that is admissible. There is, I guess, an issue, and that is why I wanted to raise it now about the admissibility of the prior act, the prior bank robbery.

THE COURT: What do you say is admissible?

MR. DOW: The conversation since it was part of the conspiracy in which David Williams indicated that he wanted five hundred dollars from each individual to buy an Olds Cutlass with or at the very least the fact that he had cased a bank that they were going to rob up in Stamford, Connecticut. As I say, that was on August 31st, some twenty days prior to the robbery.

THE COURT: How would you preface the conversation?

MR. DOW: Well --

THE COURT: How would you say what happened on a certain date when you were splitting up some money or something?

MR. DOW: No. If the court rules that I can't get into the prior bank robbery, I could narrow it down and I will advise the witness just to

answer the question: did you have an occasion to have a conversation with any of the three defendants here on August 31st? And then he would relate that, yes, he did, and that during the course of that conversation the three men talked about the commission of a bank robbery in Stamford, Connecticut.

What I seek, obviously, is the admission of the prior bank robbery, and I do that because it is probative on the issue of a common scheme or plan and, in fact, is part of the conspiracy, a continuing conspiracy in this case, but I would submit to the court that the rule in this Circuit, that is, what has been described as the inclusionary rule of admissibility of prior acts, would dictate the admission of that evidence, and the reason is that it is not being offered to show that any or all of the three defendants here on trial have bad character or things of that nature, but it does show motive and plan and premeditation.

I refer the court to the rule in the New Rules of Evidence which is --

THE COURT: I have read that.

MR. DOW: -- which I can't remember off the top of my head, the citation for it, but basically,

it repeats what I just said.

Moreover, I think the cases in this Circuit are replete with examples of the admissibility.

THE COURT: Oh, counsel, the theory is known all over every District and every Circuit, but the problem comes down to the judge weighing the harm against the advantage. Isn't that really the test?

MR. DOW: That's right. I don't deny that. In fact, I think your Honor is required to make some finding along those lines. What I am saying though, your Honor, is that the similarity of conduct is such that there can be no doubt that this is part of --

THE COURT: Are there very many plans on how to rob a bank?

MR. DOW: How about where you use a second backup car? There are not too many on that. How about where you have your getaway driver fouling up twice in a row? That makes it kind of a signature crime, if you will. Granted, it's not as unique as some of the more lurid sex offenses that you run into in terms of signature crimes but that is an indicia of the nature of the acts that these individuals committed.

Additionally, your Honor, I think as McCormick

points out, one of the factors that the court has to take into consideration is the strength of the Government's case. Frankly, the Government's case rests on the testimony of one accomplice. That's it. We have no fingerprints. We have no eye-witness identification. We have a bunch of items that were found at the scene that will come into evidence, but that have to be linked to the crime essentially through the testimony of Arthur Wendrik, a man who has been convicted of one bank robbery and who has been involved in another and who is involved, as Mr. Salaway energetically pointed out.

THE COURT: Going back a little bit, you said that the conspiracy with regard to the testimoney about why they needed some money was because they recently cased a bank in Connecticut and so forth. Would it be admissible under Count 4? That refers to a specific date and it relates to a place up in Connecticut?

MR. DOV: That is correct, your Honor. It does, and it refers to a specific date which is September 20th.

THE COURT: You had in mind something that happened just prior to that over in Queens?

MR. DOW: Correct. I don't deny that, but it seems to me, your Honor, that just taking all the various factors into consideration --

THE COURT: Well, one of the problems I have is I don't know what the defense is and that sometimes is part of the thinking process that the judge has to go through, and doesn't McCormick talk about the defense too? I think so.

MR. DOW: I believe he does, your Honor.

THE COURT: Supposing they don't testify and under their plea of not guilty all issues are in the case?

MR. DOW: That is identification and whatever.

THE COURT: All the issues that make up the Government's case in chief. I think it's really --

MR. DOW: I don't know where that takes me in terms of responding.

THE COURT: Well, there are some cases that would say that because of the defense that has been argued, the judge would take that into consideration in saying, well, this tends to at least explain part, some part of that defense, but with pleas of not guilty and nothing more, I have nothing to rely on with regard to the nature of the defense. So what I have to rely on is merely that you have

proved so far, and then what you intend to prove by this next witness and weigh that against nothing as far as the defendants are concerned. Supposing they don't take the stand at all.

MR. DOW: As to one of the defendants, that is, Mr. Washington, there has been a response to the alibi demand, not a formal response, but there is an indication that two or three witnesses may testify on his behalf. Perhaps ever Mr. Washington himself. I don't know if that decision has been made yet. Earlier indications were that the other two defendants were going to testify as well.

MR. BYELAS: That may have changed.

MR. DOW: Mr. Byelas did indicate that to me.

THE COURT: It might well be that after they do testify, it might then become more relevant than prior to the defendants' case. I think at this present standing I would judge it to be just too much weight against the defendants. I will not let you do it, but other than this witness, do you have any more?

MR. DOW: No, your Honor. We have a stipulation. Will Mr. Jefferson be allowed to testify that he was present at a conversation involving these three men where one or two of them announced

their plans to rob a bank in Stamford, Connecticut and to obtain an Oldsmobile Cutlass for that purpose?

THE COURT: Well, the two didn't plan to obtain the Oldsmobile, did they? One, I guess.

MR. DOW: David Williams said he wanted to get one, but the point is, of course, that all three were there and participated in the conversation. If I could, they were all splitting up loot. I understand your Honor's ruling not to allow me to do that.

THE COURT: No. With regard to the conversations you are not offering it as part of the Count 4, but rather as submissions against interest?

MR. DOW: That's right.

THE COURT: Well, I will hear counsel on that.

MR. SALAWAY: Your Honor, we would object. At least I would on behalf of Richard Washington to allow that evidence in.

THE COURT: Was he one of the ones mentioned?

MR. SALAWAY: Washington was mentioned as being present, not in participating in any conversation at least from what I see in the 3500 material. He was just present in the room.

Now, again, your Honor, that goes back to

allegedly another incident which he was tried for which case was eventually dismissed by the Government after the trial completed, a new trial had been ordered, and the other two defendants, of course, their attorneys can speak for them. But Count 4 does not state that Mr. Jefferson was a co-conspirator in this particular act or any acts relating to this crime. Jefferson was not a co-conspirator, not indicted. Again, your Honor, this relates to an incident that happened on August 31st, almost a month before. Vaguely, it mentions banks in Stamford, but does not mention this particular bank.

Again, your Honor, I believe that the weight of that evidence would be very damaging against all defendants, but yet I wonder about the probative value of such evidence and the prejudice there may be to all defendants. Again, it was not mentioned in Count 4.

THE COURT: He is not offering it on Count 4 as I understand it. He is offering it as an admission against interest.

MR. DON: That's correct.

THE COURT: Tell me who were the speakers at this?

MR. DOW: David Lewis and David Williams in the presence of Washington and a fellow named Scarborough.

MR. SALAWAY: Again, your Honor, if I could just state what I understand from what Mr. Dow said they were all present to split up money at another particular incident.

THE COURT: He said he wasn't going to bring that out.

MR. SALAWAY: Again, your Honor, we don't know from the 3500 material if Jefferson was having an isolated conversation with one individual or they were all there for the other purpose and this conversation was just between two or three people.

MR. DOW: I will make the offer. The proffer is they were splitting up the money, they were altogether and, essentially, around a table splitting up money.

MR. SALAWAY: Then we are bringing up two distinct crimes.

THE COURT: You said just the splitting of the money.

MR. DOW: That's right. I was trying to place it in context for Mr. Salaway so it wouldn't

appear to be two fellows were off in the corner of a room settling a bet or something. This was, essentially, they were all seated around a table. That may be an oversimplification. They were altogether. They were splitting up bank robbery proceeds and Williams said something to the effect, "Let's take five hundred off the top. We're going to get a Cutlass and we cased out a bank up in Stamford."

THE COURT: If you mention "bank robbery" again, you are running into the same trouble that I have with regard to the bank robbery itself.

MR. DOW: Right. I intend to limit the inquiry to basically as follows: we will ask Mr. Jefferson did he have occasion to be present at an apartment on Francis Lewis Boulevard in Queens on August 31, 1973? Who was there? The answer will be, I expect, Joseph Daniels, David Williams, David Lewis, Richard Washington, Jefferson and Moses Scarborough. What, if anything, was said at that time in regards to the purchase of an automobile? What, if anything, was said in regards to a bank robbery planned for the future?

Now, that may be a little -- those can be a little more sophisticated when actually put, but

what my intention to outline to your Honor now is that I want to surgically excise the part that your Honor has deemed inadmissible so that we don't get into that area and yet maintain the very, very probative evidence that the Government has of a plan for a bank robbery which constitutes an admission against interest.

THE COURT: Counsel?

MR. ECKENRODE: My feeling as far as Williams is concerned, your Honor, it can't be an admission. They're discussing something that may take place in the future. So it's not an admission that he has done it. The prejudice is obvious here because they're going to discuss a robbery in Stamford and nothing more.

THE COURT: Why would that be an admission against interest, to discuss a prospective robbery?

MR. ECKENRODE: Well, your Honor, I think it would be an admission of a fact that existed and he is discussing the future, state of facts that don't exist at that point in time.

THE COURT: And getting less money than he expected?

MR. ECKENRODE: Well --

MR. SALAWAY: Your Honor, we don't even have --

the fact is it's at Stamford. We can't even pinpoint it to this particular bank robbery. It may not even take place, what they were talking about.

THE COURT: Mr. Byelas.

MR. BYELAS: Well, the fact alone that they were gathered in a room splitting up money, the inference can be drawn from that they had been --

MR. DOW: I don't intend to elicit that thing about splitting up money. I will narrow it and limit it to the conversation that he was going to buy a Cutlass.

MR. BYELAS: All right. The way I read the 3500 material that the Government has provided us, my client, Mr. Lewis, is not -- there is nothing in there that states he said anything, but that Williams stated that he had cased the bank with Lewis. Now, I don't know. That could be a problem. He doesn't take the stand. I may not be able to cross-examine him. It raises another problem.

MR. SALAWAY: I would say, your Honor, since it only says that particular individual, the others were there for another purpose, there is going to be an inference to the jury that they all took part in this particular conversation when, in fact,

they may not have, and there would be no way to change it on the 3500 material, and we then begin cross-examining on that, no matter how limited we are, Judge, we may skip over to the bounds where we are creating a problem for our clients and we may not have much choice because how are we going to cross-examine on that issue? Why were they there? Why weren't they sitting in another room? What were they doing?

THE COURT: Well, I don't think it's as bad as the other, but I still think for my purposes I am not going to allow you to establish either the conversation or the actual robbery. It's just too dangerous, but I say this only with regard to the Government's case in chief. Things might change later on. There is the ruling.

MR. DOW: I will take my exception, your Honor.

THE COURT: It's always good to have one.

MR. DOW: Okay.

THE COURT: That is the end of the case?

MR. DOW: If that's it, that's it basically, yes. I have a stipulation to read into the record to the effect that counsel will stipulate that the following items were found in various places,

EXHIBIT B

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA, Plaintiff,	
vs.	No. N-76-5 CRIM.
ARTHUR T. HENDRIX, DAVID R. LEWIS, AARON LEROY STEWART, RICHARD WASHINGTON and DAVID WILLIAMS, Defendants.	MEMORANDUM

MURPHY, D.J.

Defendants Lewis, Stewart and Williams by their appointed counsel have applied for the issuance of subpoenas pursuant to Rule 17(b) for three U.S. Probation officers of the Southern and Eastern Districts of New York, a special agent of the F.B.I. and an Assistant United States Attorney for the Southern District of New York. The subpoena addressed to the probation officers requires each officer to bring with him the presentence investigation report that was made of the moving defendant in connection with criminal cases in the Southern and Eastern Districts of New York.

The applications, pursuant to the Rule, were made ex parte at a conference held in chambers, with Mr. Byelas representing defendant Lewis and Mr. Eckenrode representing defendant Williams. We were advised that attorney Morse, who is counsel for Stewart, joined in the applications.

The thrust of the applications is as follows:

Some time in July, 1974, Mr. Dow, an Assistant United States Attorney for the District of Connecticut, presented testimony to a grand jury in this District that

resulted in an unreturned indictment accusing these defendants of crimes related to the robbery of the Connecticut National Bank in Stamford, Connecticut, on September 30, 1973. We were further told that Mr. Dow requested the grand jury not to file the indictment. The grand jury having been discharged because its term expired, Mr. Dow subsequently presented testimony to a different grand jury. The new grand jury returned an indictment to this Court on January 5, 1976 accusing the same defendants of the same crimes.

We interviewed Mr. Dow in the presence of Mr. Eckenrode and Mr. Byelas, and Mr. Dow avowed that it was true that an indictment was voted at the time alleged and that, as he understood it, the foreman or the secretary to the grand jury put the paper in an envelope, sealed it, and at Mr. Dow's request did not return it to the Court. He also noted that the present indictment was filed on January 5, 1976, and that about two weeks ago the Clerk of this Court sent him, in a sealed envelope, what he believes is the prior "indictment", which he had not opened.*

After Mr. Dow was excused, Mr. Eckenrode argued to the effect that defendants have told their counsel that each was questioned in New York City, both in the Eastern District and in the Southern District, by probation officers not only with reference to the crimes which had been committed

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* The envelope was opened in open court this morning, May 24, 1976, with all counsel being present. It contained a three-page document entitled "Indictment," signed by the foreman and Assistant United States Attorney, and we have compared it with the Indictment filed on January 5, 1976 and they are identical.

in those Districts (bank robberies) but also with regard to the crime alleged in the indictment filed in this District on January 5, 1976. Also that they were questioned by an Assistant United States Attorney in the Southern District of New York - after each pleaded guilty to a crime in that District - concerning the facts of this Connecticut indictment. But no one made any admissions concerning the commission of such crime.

We were not told of any prejudice to any of the defendants as a result of the above related facts, nor anything else that might relate to the due process claim of these defendants.

During the presentation it was admitted that United States v. Marion, 404 U.S. 307 (1971), precludes any argument relating to a Sixth Amendment defense.

We are satisfied that we have not been furnished with any factual situation which relates even tangentially to a claim of due process violation. Accordingly, we deny the application without prejudice to permit counsel and their clients to furnish sworn proof in support of their claims. Since June 2, 1976 has been fixed as the trial date, we suggest that all counsel act with dispatch.

THOMAS F. MURPHY

Thomas F. Murphy
Senior United States District Judge

Dated: Waterbury, Ct., May 24, 1976.

We are not filing this Memorandum in order to preserve the ex parte status of the application. However, we are mailing copies to each attorney.